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No. 95-1413

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

SUSAN D. BIERI AND
LEONARD D. BIERI, III, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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App

QUESTIONS PRESENTED

1. Whether the district court erred as a matter of law when, in a purported exercise of judicial discretion, it declined to order the forfeiture of petitioners' farm under 21 U.S.C. 853(a)(2).

2. Whether the court of appeals engaged in improper fact-finding when it determined, based on findings of the district court and the facts of record, that forfeiture of petitioners' farm would not violate the Excessive Fines Clause of the Eighth Amendment.

3. Whether forfeiture of petitioners' farm constitutes an excessive fine under the Eighth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-16) is reported at 68 F.3d 232. The order (Pet. App. 17) and findings (Pet. App. 18-20) of the district court are not reported. A prior opinion of the court of appeals on the forfeiture issue (Pet. App. 23-37) is reported at 21 F.3d 819. A prior opinion of the court of appeals affirming petitioners' convictions is reported at 21 F.3d 811.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3) was entered on October 13, 1995. A petition for rehearing was denied on December 7, 1995. Pet. App. 2.

The petition for a writ of certiorari was filed on March 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Western District of Missouri, petitioners were convicted of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and of conspiring to commit that offense, in violation of 21 U.S.C. 846.[1] Petitioner Susan Bieri was sentenced to 51 months' imprisonment, and petitioner Leonard Bieri was sentenced to 57 months' imprisonment. In addition, under 21 U.S.C. 853(a), petitioners were ordered to forfeit the portion of their farm that they had used to facilitate their drug trafficking activities. Pet. App. 24-25.

The court of appeals affirmed their convictions. Pet. App. 34-35. In a separate opinion, it remanded the forfeiture judgment to the district court with directions to forfeit the entire farm, unless the district court found on remand that such a forfeiture would constitute an excessive fine, in violation of the Eighth Amendment. *Id.* at 23-37. This Court denied certiorari. 115 S. Ct. 208 (1994).

On remand, the district court declined to impose forfeiture. Pet. App. 17-20. The court of appeals reversed and ordered that the entire farm be forfeited. *Id.* at 4-16.

1. The evidence at trial established that for at least two years petitioners used their farm in rural

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[1] Petitioners were acquitted of using a firearm during and in relation to a drug trafficking offense, in violation of 21 U.S.C. 924(c). Pet. App. 25.

Missouri to store and distribute marijuana. Their scheme was discovered on January 14, 1992, when an Oklahoma state trooper stopped a car driven by George Ruiz, who was transporting 45 pounds of marijuana from Arizona to petitioners' farm. Ruiz agreed to assist authorities by delivering the drugs and by tape recording conversations during the delivery. When Ruiz delivered the drugs to petitioner Susan Bieri at petitioners' house on January 15, she paid him $300 to cover his expenses, as she had done on previous deliveries. 21 F.3d at 814. Sheriff's deputies then executed a search warrant at the house and found the marijuana that Ruiz had delivered, plus an additional 96 pounds of marijuana, cash, a loaded gun, brown wrapping paper, and other drug paraphernalia located in the house and outbuildings on petitioners' farm. Pet. App. 24-25.

2. The district court determined that petitioners had used their property to facilitate drug trafficking. Pet. App. 25, 39. Section 853(a)(2) of Title 21 requires forfeiture of "any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, [any drug trafficking felony] violation." The court ordered forfeiture, however, not of petitioners' entire four-tract dairy farm, but only of tract four of that property, on which petitioners' house and barn were located. Pet. App. 5, 25, 39.

The court of appeals reversed the forfeiture order and remanded with directions to enter an order forfeiting the entire farm unless the court concluded that such an order would amount to a constitutionally excessive fine. The court of appeals held that Section 853(a)(2) requires forfeiture of an entire property if any part of it is used to commit or facilitate a drug

trafficking crime. Pet. App. 5-6, 30-33. It also held that, because petitioners acquired the entire four-tract farm at one time and by means of a single instrument, the entire farm should be deemed "property" subject to forfeiture under Section 853(a)(2). Pet. App. 6, 32. The court of appeals instructed, however, that, if the district court concluded on remand that forfeiture of the entire farm would amount to an excessive fine under the Eighth Amendment, the district court should order forfeiture of less than the whole property to fit the forfeiture "within the broad boundaries of constitutional proportionality." *Id.* at 33-34.

3. After an evidentiary hearing, the district court ruled that there would be no forfeiture whatsoever. The court opined that petitioners' sentences of imprisonment were "enough penalty for the criminal activity associated with the property," considering the fact that the property was used as a residence and business and that petitioners' two minor children were "dependent somewhat" upon the residence. Pet. App. 7, 19. The court reasoned that a district court normally has discretion whether to impose a fine, and stated that it would exercise similar discretion in this case not to impose any forfeiture. *Id.* at 7-8, 20. The next day, the court entered a written order finding that the reasonable value of petitioners' farm was "not less than $245,000" and "that it would be in the best interests of [petitioners'] children that they be permitted to remain at the residence which is located on the farm." *Id.* at 8, 17.

4. The court of appeals reversed. It held that the district court erred in treating forfeiture under Section 853(a)(2) as a matter of judicial discretion. The court explained that the district court's only inquiry

should be "whether the defendant used the property 'in any manner or part' to commit or to facilitate a drug trafficking offense. If so, criminal forfeiture under this statute is mandatory, not discretionary." Pet. App. 9. Here, because petitioners unquestionably used parts of their dairy farm to facilitate their drug trafficking offenses, the entire farm was subject to forfeiture as a matter of law. *Id.* at 9-10.

Addressing the application of the Eighth Amendment's Excessive Fines Clause, the court of appeals stated that whether a particular forfeiture is excessive involves an analysis of, among other things, the extent and duration of the criminal activity, the gravity of the offense weighed against the severity of the criminal sanction, and the value of the forfeited property. Pet. App. 11. Based on the facts determined by the district court, as well as its own examination of the record, the court found that the drug trafficking conspiracy in this case lasted nearly two years, that petitioners' farm was integral to the scheme, and that petitioners distributed or possessed for distribution some 85 kilograms of marijuana, which had a wholesale value of $233,750. *Id.* at 12. The court pointed out, in addition, that petitioners received sentences at the lower end of the applicable Sentencing Guidelines ranges, and that the district court imposed no fine whatever even though petitioners had been subject to fines of up to $6 million. *Id.* at 12-13. Accepting the district court's determination that the farm was worth at least $245,000, the court of appeals found no great imbalance between the gravity of the offenses and the severity of the forfeiture, *id.* at 13, and it ruled accordingly that the forfeiture was not constitutionally excessive, *id.* at 15.

The court of appeals rejected the district court's reliance on the intangible value of the property and the adverse impact of its loss on petitioners' children. It explained that, while such factors might have relevance in some cases, they did not justify a finding of constitutional excessiveness here, where the forfeiture was *in personam* and petitioners had knowingly and willfully used the farm—their home—to further their marijuana trafficking operation. Pet. App. 13-14.

Judge Gibson dissented. He agreed with the majority that the district court erred in failing to conduct an analysis under the Excessive Fines Clause, but he would have remanded the case once again to give the district court another opportunity to comply with the mandate of the court of appeals. Pet. App. 16.

ARGUMENT

1. Petitioners argue (Pet. 12-19) that the court of appeals violated established standards of appellate review by failing to apply the "clearly erroneous" standard to the district court's findings. That argument is without merit. The court of appeals properly rejected the district court's exercise of its supposed discretionary powers, because whether forfeiture is required under 21 U.S.C. 853(a)(2) is a question of law, not a matter of sentencing discretion. The statute provides, in relevant part, that "[a]ny person convicted of [an enumerated violation] punishable by imprisonment for more than one year *shall forfeit* to the United States * * * any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation." 21 U.S.C. 853(a)(2) (emphasis added). The courts of appeals that have analyzed the issue have

uniformly held that the statute *requires* forfeiture of an entire property when part of it is used to further a drug trafficking crime. See *United States* v. *Smith*, 966 F.2d 1045, 1053 & n.8 (6th Cir. 1992) (citing cases). The district court's view that it had discretion to waive forfeiture was not a factual finding subject to "clearly erroneous" review, but rather an (incorrect) interpretation of law, reviewable de novo.

Petitioners contend (Pet. 13-14) that, while the district court spoke in terms of sentencing discretion, it considered factors that are relevant to the constitutional permissibility of criminal forfeitures and actually based its decision not to order a forfeiture on the Excessive Fines Clause. That claim is refuted by the district court's own explanation: "As a normal rule, any time a fine is imposed within the statute or no fine is imposed, it's discretionary with the trial court. I don't know whether that's true in regard to a forfeiture or not but I'm going to test it." Pet. App. 20. That passage makes clear that the district court's decision was based, as the court of appeals concluded, "upon a purported exercise of discretion which did not and does not exist." *Id.* at 12. At no point did the district court articulate the view that forfeiture of petitioners' farm would constitute an excessive fine within the meaning of the Eighth Amendment.

2. Petitioners argue (Pet. 19-21) that the court of appeals engaged in fact-finding, and thereby deprived them of due process, when it determined that forfeiture of petitioners' farm was not an excessive fine within the meaning of the Eighth Amendment. Contrary to petitioners' argument, the court of appeals did not engage in fact-finding; rather, it appropriately and correctly analyzed petitioners' constitutional

challenge in light of the facts found by the district court and contained in the record.

The court of appeals did not ignore or dispute the district court's factual findings. It expressly recognized that the district court "made relevant fact-findings concerning the criminal sanctions imposed, the value of the farm, and its importance as a residence for [petitioners'] innocent minor children." Pet. App. 11-12. At the same time, however, the court of appeals recognized that the district court did not decide whether the forfeiture constituted an excessive fine under the Eighth Amendment. Although the court of appeals could have remanded for a second time with directions to the district court to analyze the constitutional question, it chose instead, permissibly, to decide for itself whether forfeiture in this case would constitute an excessive fine, "[b]ased upon [its] review of the facts found by the district court and of the record." *Ibid.*

The court of appeals pointed out that the record demonstrated that petitioners' criminal involvement lasted nearly two years; that petitioners' farm was integral to the marijuana distribution conspiracy; that petitioners had possessed or distributed 85 kilograms of marijuana from the farm; and that that marijuana had a wholesale value of some $233,750. Pet. App. 12.[2] The court concluded that the forfeiture was not grossly disproportionate in the constitutional sense, because the value of the property was roughly equivalent to the total dollar volume of petitioners'

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[2] Significantly, petitioners do not dispute the court of appeals' characterization of the facts of record on these (or indeed any other) points.

criminal activity and far less than the statutorily authorized fine for petitioners' offense. *Id.* at 15.

3. Finally, petitioners argue (Pet. 22-28) on the merits that forfeiture of the farm constitutes an excessive fine. Petitioners assert that the court below "properly determined that a multi-factor, proportionality test should be applied when the forfeiture of property is challenged as an excessive fine under the Eighth Amendment." Pet. 24.[3] They challenge only the court of appeals' weighing of those factors in the particular circumstances of this case.

Petitioners' primary contention is that the court of appeals erred in declining to give sufficient weight to certain intangible factors, such as the property's character as a residence and the effect of the forfeiture on petitioners' children. The court of appeals did not entirely discount intangible value, however. It explained that the intangible value of the property is a factor "whose importance diminishes as the duration and extent of the defendant's culpability and use of the property to facilitate criminal conduct rises." Pet. App. 14. That observation is consistent with this Court's statement in *Alexander* v. *United States*, 113 S. Ct. 2766, 2776 (1993), that whether a forfeiture is

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[3] Petitioners observe (Pet. 22-23) that there is a conflict among the courts of appeals as to whether excessiveness should be analyzed for Eighth Amendment purposes under a "proportionality" approach or instead under an "instrumentality" approach. This case is not an appropriate vehicle for resolving that conflict, however, because petitioners expressly support the multi-factor proportionality approach used by the court of appeals below. Moreover, the forfeiture of petitioners' farm would have been upheld under the instrumentality approach, in light of petitioners' substantial use of the house and outbuildings on the farm for storing and processing marijuana.

excessive must be considered in "light of the extensive criminal activities which [the defendant] apparently conducted through his [criminal] enterprise over a substantial period of time."

The court of appeals thus recognized that its multifactor approach to proportionality analysis would vary with the specific facts of each case. Pet. App. 14. Here, it determined that the intangible value of the farm was not sufficient to outweigh the other factors that supported forfeiture, especially petitioners' criminal culpability and use of the farm to conceal their criminal activities. *Id.* at 14-15.[4] That fact-bound conclusion is correct and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] The court acknowledged that petitioners' children would suffer from the forfeiture, but pointed out that the children would suffer primarily not from the loss of the farm, but from petitioners' incarceration, which resulted from petitioners' decision to engage in criminal activity. Pet. App. 14.